IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs May 16, 2006

STATE OF TENNESSEE v. KELLY HUMPHREY, ALIAS

Direct Appeal from the Criminal Court for Knox County
No. 78650 Richard R. Baumgartner, Judge

No. E2005-01624-CCA-R3-CD - Filed June 12, 2006

The appellant, Kelly Humphrey, pled guilty in the Knox County Criminal Court to sexual battery by an authority figure and statutory rape, and he received a total effective sentence of three years with the trial court to determine the manner of service. At the sentencing hearing, the trial court denied the appellant's request for alternative sentencing, which denial the appellant appeals. Upon our review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

William C. Talman, Knoxville, Tennessee, for the appellant, Kelly Humphrey, alias.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Phillip H. Morton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

In December 2003, the appellant was charged by presentment with sexual battery by an authority figure, a Class C felony, and statutory rape, a Class E felony. On November 9, 2004, the appellant pled guilty to the charges in exchange for a three-year sentence on the sexual battery conviction and a one-year sentence on the statutory rape conviction, with the sentences to be served concurrently. The plea agreement also provided that the appellant would be allowed to apply for probation.[1]

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[1] A transcript of the guilty plea hearing was not included in the record for our review.

At the sentencing hearing, the trial court reviewed the appellant's presentence report.[2] Defense counsel informed the court the report reflected that the appellant's only criminal history consisted of two rape convictions from the 1980s. Counsel explained that the rape convictions were the result of the appellant sexually abusing his two oldest daughters. The presentence report indicated that the appellant had told the person preparing the report that the instant convictions stemmed from his granddaughter's sexual advances towards him. The appellant claimed that he acceded to her advances because he was in poor health and afraid. The trial court, after reviewing the appellant's statement, commented that it did not believe the appellant's version of events contained in the presentence report.

The appellant testified at the sentencing hearing. He admitted that he told the person preparing the presentence report a fictitious account of the offenses, claiming that he shifted the blame to his granddaughter because he was scared. Specifically, he said, "My intentions at that time was to make myself look good and her to look bad so that I could actually shift the blame, when it – it was my fault." He stated that he had thought that his "problem" had been cured years earlier and had believed that he was no longer a sex offender. Regardless, he admitted that when "the opportunity presented itself . . . I found out that I wasn't over it yet." The appellant said that he was sorry for hurting his family. He maintained that he needed counseling and that his wife would endure financial hardship if he were incarcerated.

After the appellant's testimony, the trial court commented that the case was "very troubling." The court stated, "This man is on his second generation of molesting relatives . . . . He had every opportunity when he was in Florida and abused his daughters to get care and treatment and all that stuff, and here we go on the next generation. That's just – it's repulsive, and he's had his chance at probation." The trial court further stated:

> [T]his is not an event that occurs in a vacuum. The history with [the appellant] is that he abused his two – own two daughters many years ago over a period of – a long period of time, was convicted of those offenses and incarcerated for a period of time and was given treatment.
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> And now many years after that event, he's done the exact same thing to the granddaughter, and then he puts in this report, as a lot of sex offenders do, that it wasn't – wasn't him. It was – it was her fault. Now, when confronted with that this morning or this afternoon, he acknowledges that that version of his events that he told to the presentence writer and to the counselor, whose report is based

[2] The record reflects that the trial court also examined a psychosexual report regarding the appellant. At the beginning of the trial, the State told the court, "We like to file the PSI [presentence report], and we need to make sure the psychosexual report is in there as well." However, the psychosexual report was not included in the record for our review.

> on the fact that that's his version of what happened, even though she suspected some question about it but took it at face value.
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> He now acknowledges that, in fact, that's a total – totally not true. I don't know how else to say it. You know, he's had counseling. He's done this before. He's now done it again. He lied to the presentence reporter. He's lied to the counselor in this case.

Based upon the foregoing, the trial court denied alternative sentencing. On appeal, the appellant argues that he should have been granted full probation, or, in the alternative, split confinement.

II. Analysis

Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2003). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentence(s). See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

An appellant is eligible for alternative sentencing if the sentence actually imposed is eight years or less. See Tenn. Code Ann. § 40-35-303(a) (2003). Moreover, an appellant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6). In the instant case, the appellant is a standard Range I offender convicted of a Class C felony and a Class E felony; therefore, he is presumed to be a favorable candidate for alternative sentencing. However, this presumption may be rebutted by "evidence to the contrary." State v. Zeolia, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996). The following sentencing considerations, set forth in Tennessee Code Annotated section 40-35-103(1), may constitute "evidence to the contrary":

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
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> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Zeolia, 928 S.W.2d at 461.

The presumption in favor of alternative sentencing may be overcome by facts contained in the presentence report, evidence presented by the State, the testimony of the accused or a defense witness, or any other source, provided it is made a part of the record. See State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). Additionally, a court should consider a defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. See Tenn. Code Ann. § 40-35-103(5). A court may also apply the mitigating and enhancement factors set forth in Tennessee Code Annotated sections 40-35-113 and -114 (2003) as they are relevant to the sentencing considerations set forth in Tennessee Code Annotated section 40-35-103. See Tenn. Code Ann. § 40-35-210(b)(5).

As we previously noted, one of the considerations in our de novo review is the nature and characteristics of the criminal conduct involved. However, the appellant has failed to include the transcript of the guilty plea hearing in the record for our review. This court has previously noted,

> For those defendants who plead guilty, the guilty plea hearing is the equivalent of trial, in that it allows the State the opportunity to present the facts underlying the offense. For this reason, a transcript of the guilty plea hearing is often (if not always) needed in order to conduct a proper review of the sentence imposed.

State v. Keen, 996 S.W.2d 842, 843 (Tenn. Crim. App. 1999) (citation omitted). Accordingly, the appellant's "failure to include the transcript of the guilty plea hearing in the record prohibits the court's conducting a full *de novo* review of the sentence under [Tennessee Code Annotated section] 40-35-210(b)." State v. Shatha Litisser Jones, No. W2002-02697-CCA-R3-CD, 2003 WL 21644345, at *3 (Tenn. Crim. App. at Jackson, July 14, 2003). Regardless, from the testimony at the sentencing hearing, we conclude that the trial court did not err in denying the appellant alternative sentencing.

As the trial court noted, the appellant demonstrates a disturbing pattern of sexually abusing his family members. Despite his previous convictions for rape and his subsequent treatment, the appellant once again raped a family member when "the opportunity presented itself." See State v. Hooper, 29 S.W.3d 1, 12 (Tenn. 2000). Moreover, the appellant's untruthfulness and lack of candor reflect poorly on his potential for rehabilitation. We conclude that the record amply supports the trial court's finding that the appellant was not a suitable candidate for alternative sentencing.

III. Conclusion

Finding no reversible error, we affirm the judgment of the trial court.

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NORMA McGEE OGLE, JUDGE